

COMMONWEALTH OF PENNSYLVANIA

Sean M. Donahue : State Civil Service Commission  
 :  
 v. :  
 :  
 Office of Administration, :  
 Executive Offices : Appeal No. 30145

Sean M. Donahue : Anthony E. Holbert  
*Pro Se* : Attorney for Office of  
 : Administration

ADJUDICATION

This is an appeal by Sean M. Donahue challenging the scoring mechanism utilized by the Office of Administration, Executive Offices (hereinafter “OA”) to score the Disability Claims Adjudicator Trainee (CS-20181844-45070) position. A hearing was held October 4, 2022, via video, before Commissioner Gregory M. Lane.

The Commissioners have reviewed the Notes of Testimony and Exhibits introduced at the hearing. The issue before the Commission is whether the OA’s scoring of appellant’s Disability Claims Adjudicator Trainee (CS-20181844-45070) examination was motivated by his veteran status.

## FINDINGS OF FACT

1. By email dated January 25, 2019, appellant was advised he had a final earned rating of eighty on the examination for Disability Claims Adjudicator Trainee (CS-20181844-45070). Comm. Ex. A.
2. The appeal was properly raised before this Commission and was heard under Section 951(b) of the Civil Service Act, as amended. Comm. Exs. B-H1.<sup>1</sup>
3. From January 1 to January 14, 2019, the Department of Labor and Industry posted a Job Vacancy announcement for Disability Claims Adjudicator Trainee. Ap. Ex. 902; OA Ex. 1.
4. The application included supplemental questions, which OA deemed examination questions. Ap. Ex. 902; OA Ex. 4.

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<sup>1</sup> The vacancy and scoring of appellant's examination at issue in the present appeal occurred prior to the full implementation of Act 71 of 2018, P.L. 460, No. 71, codified as 71 Pa.C.S. §§ 2101-3304. Full implementation occurred on March 28, 2019, the date on which all sections of Act 71 went into effect. *See* Act 71 of 2018, Section 3. Consequently, the substantive provisions of the Civil Service Act (Act 286 of 1941, P.L. 752, No. 286, 71 P.S. §§ 741.1-741.1005) and implementing regulations apply to the present appeal because that was the law in effect at the time of the posting and scoring of appellant's Disability Claims Adjudicator Trainee examination.

5. Supplemental examination question three is titled “College Coursework or Field” and reads:

Bachelor’s Degree in one of the fields:  
Counseling, Psychology, Sociology,  
Social Work, Vocational  
Rehabilitation, Human Services/Health  
Services Administration, Biology,  
Child Development, Human  
Behavior/Development, Organizational  
Behavior, Special Education, Nursing,  
English or Communication

Select the “level of education” which  
best describes your claim.

- A. I have a Bachelor’s  
Degree with at least 24  
credits (major) in  
ONE of the fields  
above.
- B. I have a Bachelor’s  
Degree with at least 12  
credits but less than 24  
credits in the fields  
above.
- C. The two options above  
do not apply to me.

Ap. Ex. 902; OA Ex. 4 (emphasis in original).

6. In response to supplemental examination question three, appellant answered, “C,” indicating neither of the first two options were applicable. N.T. p. 144, 206, 221-222; Ap. Ex. 901; OA Ex. 4.

7. The scoring system for the Disability Claims Adjudicator Trainee position, supplemental question three, was scored as follows:
  - a) Answer “A” was worth fifteen points.
  - b) Answer “B” was worth two points.
  - c) Answer “C” was worth zero points.

N.T. pp. 82, 297; Ap. Ex. 300.

8. Appellant answered supplemental question three with “C” and, therefore, received zero points for the question. N.T. pp. 62; Ap. Ex. 901; OA Ex. 4.
9. Based upon the total points awarded for all of his supplemental examination questions, appellant’s raw score for the Disability Claims Adjudicator Trainee position was twelve. N.T. p. 310.
10. Examination raw scores were placed into a “Group Scoring” system. Individuals with raw scores between one and seven received a final earned rating of sixty-five. Individuals with raw scores between eight and fourteen received a final earned rating of eighty. Individuals with raw scores between fifteen and twenty-seven received a final earned rating of ninety-five. N.T. pp. 298, 321; Ap. Ex. 300.

11. Appellant's raw score of twelve fell into the range awarded a final earned rating of eighty. N.T. pp. 310-311; OA Ex. 5.
12. When appellant's name was added to the List of Eligibles for the Disability Claims Adjudicator Trainee (CS-201818444-45070), it indicated a "V" for his status as a veteran, a final earned rating of eighty, and a total score of ninety after ten additional points were added for his veteran status. N.T. pp. 313-314; Ap. Ex. 4008.
13. When OA scored the examination questions, many individuals had their scores raised based upon the college credits shown on the transcripts they submitted. N.T. pp. 75, 114-116, 122-143, 159, 162, 253, 260-261, 272, 321; Ap. Exs. 101.1 (pp. 22-28, 260-265, 386-391, 417-425, 532-537, 573-578, 604-611, 618-624, 707-713), 101-2, 300, 2002.
14. When college credits were reviewed, individuals with a major in one of the fields listed or twenty-four credits in one of those subjects received fifteen points for answer "A." N.T. pp. 233, 318.

15. Individuals whose transcripts showed a Bachelor's Degree in a field not listed who had at least twelve credits in those subjects received two points for answer "B." N.T. p. 233.
16. Appellant's transcripts indicate he does not have a major in any of the subjects listed in supplemental examination question three. Appellant's transcripts show six credits for sociology courses, twelve credits in biology courses, which is one of the majors listed in the supplemental question, and six credits for English classes for a total of twenty-four credits. N.T. pp. 99-100, 104-107, 204-205; Ap. Exs. 802, 901; OA Ex. 4.
17. Based upon the information in appellant's college transcripts, appellant could have properly answered "B" for supplemental examination question three, which would have raised his raw score two points, to a raw score from twelve to fourteen. N.T. p. 318.
18. A raw score of fourteen is within the range of the candidates scoring between eight and fourteen, who all received a final earned rating of eighty. N.T. pp. 318-319; Ap. Ex. 300.

## DISCUSSION

The issue before the Commission is whether the Office of Administration's (hereinafter "OA") scoring of appellant's examination for Disability Claims Adjudicator Trainee (CS-20181844-45070) was motivated by his veteran status. Appellant alleges he was discriminated against because the Office of Administration (hereinafter "OA") did not revise his score upwards to reflect college credits he has earned and, therefore, the application of his veterans' preference did not place him as high as he should have been on the List of Eligibles.<sup>2</sup>

Appellant testified on his own behalf and presented the testimony of Human Resource Analyst 5, Office of Administration, Angel Nieves. The appointing authority did not present witnesses.

In an appeal alleging discrimination, appellant bears the burden of establishing the personnel action was due to discrimination. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989). The Civil Service Act addresses both "traditional" and "procedural" discrimination.<sup>3</sup> "Traditional discrimination" encompasses claims based upon non-merit factors. *Price v. Luzerne/Wyoming Counties Area Agency on Aging*, 672 A.2d 409, 411 n. 4 (Pa. Commw. 1996); *Pronko v. Department of Revenue*, 114 Pa. Commw. 428, 539 A.3d 462 (1988); 71 P.S. §905a. In claims of "traditional discrimination," the appellant

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<sup>2</sup> "Veterans' preference" refers to the hiring preference for veterans who are seeking employment in public positions in Pennsylvania. "Veterans' preference" is established in Chapter 71 of the Pennsylvania Military and Veterans Code, 51 Pa. C.S. §§ 7102-7109. Although there is no testimony specifically stating appellant is a veteran, the appointing authority does not contest the assertion and Human Resource Analyst 5, Office of Administration, Angel Nieves testified regarding the application of veterans' preference to appellant's score.

<sup>3</sup> "Procedural discrimination" involves a violation of procedures required pursuant to the Act or related Rules. *Price, supra; Pronko, supra*. Appellant does not allege any procedural discrimination.

must prove a *prima facie* case of discrimination by producing sufficient evidence that, if believed, indicates that more likely than not discrimination has occurred. *Henderson v. Office of the Budget*, 126 Pa. Commw. 607, 560 A.2d 859 (1989); *Department of Health v. Nwogwugwu*, 141 Pa. Commw. 33, 594 A.2d 847 (1991). Discrimination cannot be inferred, but rather the appellant must present demonstrative affirmative, factual support for the allegations. *Price, supra*. An employee claiming disparate treatment must demonstrate that he or she was treated differently than others who were similarly situated. *Nwogwugwu*, at 141 Pa. Commw. at 40, 594 A.2d at 851 (1991). Once a *prima facie* case of discrimination has been established, the burden shifts to the appointing authority to present a legitimate, non-discriminatory explanation for the employment action. Appellant always retains the ultimate burden of persuasion and must demonstrate that the proffered merit reason is merely a pretext for discrimination. *Id.* In the instant appeal, appellant's argument that his Disability Claims Adjudicator Trainee examination was improperly scored presents a traditional discrimination claim.

Appellant presents two arguments. First, appellant asserts OA treated him differently than other candidates when scoring his examination, specifically supplemental question three. Second, as a result of improperly scoring supplemental question three, his veterans' preference points did not place him high enough on the List of Eligibles. Appellant argues when OA adjusted examination scores for other individuals, OA erred in overlooking his examination and he should have been given credit for answering "A" for supplemental question three because he earned at least twenty-four credits in the various subjects listed.

Supplemental examination question 3 is titled “College Coursework or Field” and reads:

Bachelor’s Degree in one of the fields: Counseling, Psychology, Sociology, Social Work, Vocational Rehabilitation, Human Services/Health Services Administration, Biology, Child Development, Human Behavior/Development, Organizational Behavior, Special Education, Nursing, English or Communication

Select the “level of education” which best describes your claim.

- A. I have a Bachelor’s Degree with at least 24 credits (major) in ONE of the fields above.
- B. I have a Bachelor’s Degree with at least 12 credits but less than 24 credits in the fields above.
- C. The two options above do not apply to me.

Ap. Ex. 902; OA Ex. 4 (emphasis in original). Appellant answered supplemental examination question three with “C.” N.T. p. 144, 206, 221-222; Ap. Ex. 901; OA Ex. 4. The scoring system for the Disability Claims Adjudicator Trainee position, supplemental question three, was to be scored as follows: Answer “A” was worth fifteen points; answer “B” was worth two points; answer “C” was worth zero points. N.T. pp. 82, 297; Ap. Ex. 300. Appellant received zero points for his answer to supplemental examination question three. N.T. pp. 62; Ap. Ex. 901; OA Ex. 4.

Upon cross examination, appellant acknowledged he has earned two Bachelor's Degrees, although neither are in any of the fields listed in supplemental examination question three. N.T. pp. 213-214; Ap. Exs. 802, 901; OA Ex. 4. Transcripts appellant submitted with his application, show six credits for sociology courses, twelve credits for biology courses, and six credits for English classes for a total of twenty-four credits. N.T. pp. 99-100, 104-107; Ap. Exs. 802, 901; OA Ex. 4. Appellant testified many individuals had their examination scores revised upwards after OA reviewed their attached transcripts. N.T. pp. 75, 114-116, 122-143, 159, 162; Ap. Exs. 101.1 (pp. 22-28, 260-265, 386-391, 417-425, 532-537, 573-578, 604-611, 618-624, 707-713), 101-2, 300, 2002. Thus, appellant argues, when OA revised examination scores for other individuals, OA should have counted his twenty-four credits, including his twelve credits in Biology, and revised his examination to reflect a response to supplemental examination question three of "A" and awarded him fifteen points toward his raw score. N.T. p. 99, 122, 154-155.

On behalf of appellant, OA Human Resource Analyst 5 with OA Angel Nieves testified regarding how OA scored the examinations. Specifically, he explained, each answer to an examination question was scored and then totaled for a raw score. N.T. pp. 298, 321; Ap. Ex. 300. The raw scores were then placed into a "Group Scoring" system. Individuals with raw scores between one and seven received a final earned rating of sixty-five. N.T. pp. 298, 321; Ap. Ex. 300. Individuals with raw scores between eight and fourteen received a final earned rating of eighty. N.T. pp. 298, 321; Ap. Ex. 300. Individuals with raw scores between fifteen and twenty-seven received a final earned rating of ninety-five. N.T. pp. 298, 321; Ap. Ex. 300. Appellant's raw score of twelve fell into the range of a final earned rating of eighty. N.T. pp. 310-311; OA Ex. 5.

Nieves explained group scoring is a process approved under 4 Pa Code § 95.46, which provides in relevant portion: “When test scores are used to categorize or group similarly qualified applicants, all candidates in a category shall be assigned the same final earned rating.” He also explained the credits on appellant’s transcripts entitled him to reply to supplemental question three with “B,” which would have provided him with two additional points and raised his raw score from twelve to fourteen. N.T. p. 318-319; Ap. Ex. 300. Even with two additional raw score points, based upon the Group Scoring, appellant’s raw score would have remained in the category of individuals who received a final earned rating of eighty. N.T. pp. 318-319; Ap. Ex. 300. Nieves explained OA’s practice is to substantiate the information provided by an individual. N.T. pp. 260-261. Nieves acknowledged individuals had their scores revised upwards, but OA should not have done so. N.T. pp. 253, 260-261, 272.<sup>4</sup>

We now discuss the second portion of appellant’s argument, specifically, appellant argues OA “low balled” his examination score, and therefore the effect of his ten veterans’ preference points were undermined and erased. Comm. Ex. B. The hiring preference for veterans seeking employment in public positions in Pennsylvania is set forth in Chapter 71 of the Pennsylvania Military Code, 51 Pa.C.S. §§ 7102-7104. There are two components of veterans’ preference that veterans receive when applying for a civil service covered position in Pennsylvania. First, every veteran who passes the civil service examination for the position in

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<sup>4</sup> The Commission notes the wording of supplemental question three is confusing. Of note, option “A” unambiguously indicates the twenty-four credits must be within “one” of the fields listed. However, option “B” does not clearly indicate that “at least 12 credits but less than 24 credits” must be only in one of the fields listed. This lack of precision is confusing and can lead to candidates inadvertently providing an incorrect response.

question is entitled to have ten points added to their final score. 51 Pa.C.S. § 7103(a). Second, veterans' preference law provides that whenever the Commission issues a certified list of eligibles for appointment to a civil service position and the veteran is one of the three highest scoring eligibles on the certification list, the veteran will have a mandatory preference for appointment to the public position over any other non-veteran applicant within the Rule-of-Three. 51 Pa.C.S. § 7104(b). Here, appellant has failed to establish his veterans' preference was not properly awarded.

Nieves testified appellant's veterans' preference points were correctly applied. Specifically, 4 Pa. Code § 95.46 states in relevant portion, "The final earned rating for each applicant who passes all parts of an examination shall be calculated prior to the addition of any veterans' preference..." Here, appellant had a final earned rating of eighty before the addition of ten points for his veterans' preference. N.T. p. 311. Nieves explained the appropriate place for the addition of the veterans' preference points is the List of Eligibles for the vacancy. N.T. p. 312. In this instance, the List of Eligibles for the vacancy does indicate appellant has veteran status and ten additional points, making his score a ninety. N.T. pp. 314-315; Ap. Ex. 4008; OA Ex. 8.

Further, appellant asserts his veterans' preference points should place him higher on the List of Eligibles than every candidate without veterans' preference. However, appellant has not presented any portion of the Civil Service Act or Rules or the Military Affairs Act supporting this claim.

After the presentation of appellant's case, the appointing authority made a motion to dismiss for failure to establish a *prima facie* case of discrimination. The Commission recognizes the burden of establishing a *prima facie* case cannot be

an onerous one. *Henderson*, 126 Pa. Commw. at 616, 560 A.2d at 864. However, in this instance, appellant has not met his initial burden of establishing discrimination.

Here, appellant has shown disparate treatment in the application of the scoring system. *See, Nwogwugwu, supra*. Appellant established individuals' scores for supplemental examination question three were to be based solely upon substantiating information in the application. Instead, individuals had their scores revised upwards while appellant's score was not revised. However, the credible<sup>5</sup> testimony of Nieves established appellant would have raised his raw score by two points if he had answered "B" or OA had changed his response to "B" instead of C. However, even with two additional points, his adjusted raw score would still have placed him in the range of those who earned a final earned rating of 80.

Additionally, appellant has failed to demonstrate any discrimination with respect to the application of veterans' preference. Appellant's score on the List of Eligibles for Disability Claims Adjudicator Trainee (CS-201818444-45070) was properly listed as a ninety, which included the additional ten points for his status as a veteran. Thus, the appointing authority's Motion to Dismiss is granted for failure to establish a *prima facie* case of discrimination. Accordingly, we enter the following:

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<sup>5</sup> The Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *McAndrew v. State Civil Service Commission (Department of Community and Economic Development)*, 736 A.2d 26 (Pa. Commw. Ct. 1999).

CONCLUSION OF LAW

The appellant has not presented evidence demonstrative of discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of Sean M. Donahue challenging the scoring mechanism utilized by the Office of Administration for the Disability Claims Adjudicator Trainee (CS-201818444-45070) position and sustains the action of the Office of Administration in the scoring of Sean M. Donahue for Disability Claims Adjudicator Trainee (CS-201818444-45070) position.

State Civil Service Commission

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Maria P. Donatucci  
Chairwoman

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Gregory M. Lane  
Commissioner

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Pamela M. Iovino  
Commissioner

Mailed: March 20, 2023